

Judicial Federalism and Abortion in Mexico and the United States

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As the US Supreme Court was preparing to overturn *Roe v. Wade*, the Mexican Supreme Court issued a series of sweeping rulings to liberalize abortion—part of a larger trend across Latin America (Daby and Moseley 2022; Fernandez Anderson 2017; Reuterswård 2020; Ruibal 2014). Mexico has created a nationwide standard of access to abortion services, whereas the United States has abandoned universal legal abortion and embraced a patchwork system in which each state has different laws regulating reproductive healthcare. Why are these two neighbors on such divergent paths? This contribution to the symposium compares the ways that federalism and judicial politics have interacted in Mexico and the United States to explain the different trajectories of abortion policy. The divergent paths of the United States and Mexico can be explained by the two countries' different experiences with democracy and political and institutional differences between the judiciaries. A different civil-society and constitutional context also has played a role.

JUDICIAL FEDERALISM AND ABORTION

Federalism has shaped the political process for abortion policy-making and access to reproductive healthcare in Mexico and the United States. In contrast to the other major federations in the Americas, state governments in the United States and Mexico have their own criminal codes, which has resulted in periods of extreme divergence in subnational abortion policy. Federalism allows for greater levels of policy innovation and diversity; however, Supreme Courts can limit the autonomy of subnational governments and enforce greater policy homogeneity across political units. Federal systems vary in terms of how accessible abortion is in general as well as how much policy diversity exists across subnational units.

The patterns of abortion policy are driven by interactions between state legislative decisions and Supreme Court rulings. Studies have found that as the Supreme Court increases rights protection nationwide, policy diversity declines (Kastellec 2018). This hypothesis is difficult to examine in the case of abortion law because of conflicting views about whether to protect the rights of gestating people or fetuses. Other scholars describe a more complex interaction between Supreme Court rulings and subnational legislation. Patton (2007) found that state legislatures in the United States react to changes from the US Supreme Court by enacting new laws after the Court clarifies which measures are constitutional. Wilson (2020) found that a shift in the ideological composition of the US Supreme Court encouraged state legislatures to enact new laws that clearly were

unconstitutional under existing interpretations in an effort to push the Court to rule in their favor. In Mexico, a wave of reforms to enshrine fetal personhood in state constitutions took place in reaction to the Mexican Supreme Court's decision to uphold Mexico City's decriminalization in 2008. Shortly after the 2021 abortion rulings in Mexico, eight Mexican states decriminalized abortion. Thus, we can see that there is a complex interaction between the Supreme Court and state legislatures in both the United States and Mexico.

TWO DIFFERENT TRAJECTORIES FOR ABORTION POLICY

The legalization of abortion took place much earlier and much quicker in the United States. The United States legalized abortion nationwide in 1973, only three years after the first state allowed abortion on request. Abortion remained generally illegal across Mexico throughout the twentieth century. In 2000, abortion suddenly emerged as a polarizing issue and state legislatures became engaged. The Mexican Supreme Court addressed abortion for the first time in 2000, upholding Mexico City's initial liberalizing reforms that added exceptions for the health of the mother and fetal abnormality. In 2007, Mexico City decriminalized abortion for any reason during the first 12 weeks of gestation and established government clinics to provide abortions free of charge. The Mexican Supreme Court upheld Mexico City's decriminalization, and then a conservative backlash unfolded across the country. Within a year, 15 states had passed constitutional amendments establishing that life begins at the moment of conception. As a result, some women who had an abortion were charged with homicide. In 2011, the Mexican Supreme Court upheld the fetal-life amendments, thereby allowing almost complete autonomy of state governments over abortion law.

Complete national legalization was established in the United States with only one Supreme Court decision. In Mexico, in contrast, a series of Supreme Court decisions gradually created more access to abortion. In 2018, the Court dramatically increased the rape exemption, ruling that authorization was not required to legally obtain an abortion in the case of rape. In 2019, the Court extended the health exemption countrywide (Ruibal 2021). The Mexican Supreme Court's most dramatic push to decriminalize abortion was a result of three decisions in the fall of 2021, 14 years after Mexico City allowed abortions on request. The first of these decisions struck down the law that criminalized abortion in the state of Coahuila. In the second case, the Court found unconstitutional the fetal-life amendment in the state constitution of Sinaloa. The third case declared unconstitutional a rule in the

General Health Law that allowed for conscientious objection to performing an abortion. In September 2023, the Mexican Supreme Court struck down the criminalization of abortion in the federal penal code, removing all federal penalties and requiring federal health centers to provide abortions. By 2024, 20 Mexican states still criminalized abortions; however, they could be provided in every state in federal health institutions, and criminal punishments could not be enforced.

As Mexico was gradually liberalizing abortion, many US states began to create ever-greater obstacles to abortion care. In 2008, the same year that a wave of fetal-life amendments passed in Mexican states, Colorado became the first US state to put a fetal-personhood amendment on the ballot. Furthermore, US states enacted a record number of abortion restrictions in 2011 (Ziegler 2020). In 2019, after President Trump appointed two new Supreme Court Justices, there was a rush of new state laws to criminalize abortion. Then, in 2022, the Dobbs decision struck down *Roe v. Wade* and recriminalization occurred across the country. The United States currently has the same type of extreme policy diversity that characterized Mexico before 2018.

EXPLAINING THE DIFFERENT POLICY PATHS

Why was Mexico so late to legalize abortion, and why did Mexico start to legalize abortion when the United States was moving in the opposite direction? The policy divergence between Mexico and the United States can be explained primarily by Mexico's late transition to democracy and the related institutional and political differences in the judiciary. There is greater partisan polarization in the US Supreme Court and conservative religious activists have stronger influence over the judiciary. There also are different constitutional protections that may have influenced policy outcomes.

TRANSITION TO DEMOCRACY

Mexico's status as a new democracy shaped political outcomes in the first decades of the twenty-first century. Mexico was governed by a one-party authoritarian regime for most of the twentieth century. Until the democratic transition in the 1990s, policy decisions were made by the ruling party, the *Partido Revolucionario Institucional* (PRI), a secular and centrist party. During the authoritarian era, the judiciary served the interests of the executive and the ruling party, and there was only limited judicial review. Ortiz-Ortega (2007, 197) argued that the PRI and the Catholic Church had a "gentlemen's agreement" to minimize access to abortion. As Mexico began to transition to democracy, abortion became more politically salient (Beer 2017). The first democratic elections in 2000 unleashed a new competitive dynamic between the conservative Catholic party, *Partido Acción Nacional* (PAN) (which controlled the presidency), and the secular left party, *Partido de la Revolución Democrática* (PRD) (which controlled the government of Mexico City). This new political competition increased the independence of the judiciary, empowered civil society, and sparked conflict in many policy areas including abortion.

At the same time in the United States, increasing polarization and democratic backsliding shaped abortion policy.

Governing electoral minorities empowered through gerrymandering and the electoral college remade the judiciary. A president elected by a minority of the electorate together with his party's use of constitutional hardball techniques changed the ideological balance of the US Supreme Court and enabled the recriminalization of abortion (Levitsky and Ziblatt 2018, 111–12).

POLITICIZATION OF SUPREME COURTS

Institutional and political differences between the Supreme Courts can explain different trajectories of abortion policy. The US Supreme Court is composed of nine justices who serve a lifetime appointment. In Mexico, the Supreme Court is composed of 11 justices who serve a 15-year term.¹ The lifetime appointments of justices in the United States make the stakes of the nomination process much higher. The lifetime tenure for US justices also allows for the entrenchment of historical majorities because justices can choose to retire strategically to allow a like-minded president to appoint their successor. Lifetime tenure also means that the distribution of power within the Court may depend on the randomness of when justices die. As a result, although Democrats have controlled the White House for the majority of the past 30 years, Republican presidents were able to appoint six of the nine justices.

Mexico's 15-year term means that there is more congruence between a party's success in presidential elections and the party's ability to appoint justices to the Supreme Court. Moreover, there is constant turnover, bringing new perspectives. In contrast to the rising influence of conservative presidents over judicial nominations in the United States, Mexico has been governed by a president from a left party (Morena) since 2018; by a centrist, secular party (PRI) for the six years before that; and by the conservative Catholic party (PAN) from 2000 to 2012. In 2023, when the federal abortion case was decided, the Mexican Supreme Court included five justices appointed by the PAN, two by the PRI, and four by Morena.

In the United States, Supreme Court Justices are selected by the President and confirmed by the Senate. Before 2017, US Senate rules required 60 votes (of 100 members) to approve appointments to the US Supreme Court. In 2017, Republicans changed the rules to allow US Supreme Court Justices to be appointed with a simple majority. In Mexico, justices are chosen by the Senate from a list of three candidates provided by the President. Two thirds of the Senators present must vote in favor to confirm one of the designees. If the Senate rejects all three candidates, the President must send another slate of three candidates to the Senate. If the Senate rejects the second slate, the President can appoint anyone to the bench. Until 2023, the process was not especially politicized; however, for the first time in 2023, the Senate rejected two slates of candidates, and President López Obrador appointed a close loyalist to serve on the Mexican Supreme Court. In the United States, the process of selecting Supreme Court Justices became highly politicized much earlier. After President Reagan's nomination of Robert Bork in 1987, the selection process became more partisan with parties vetting candidates for years in advance to guarantee that they would be loyal to partisan goals. The extraordinary

polarization is evidenced by the Republicans' refusal to vote on President Obama's nomination of Merrick Garland in 2016.

Another important institutional difference is the power of judicial review. The United States has had judicial review since *Marbury v. Madison* in 1803. In Mexico, there was only minimal judicial review through *amparo* suits until reforms in 1994 established constitutional review and created a more independent judicial system. As the Mexican Supreme Court has slowly gained influence, politics has become increasingly judicialized. However, because the Court had not been called on to decide many important cases until recently, it remained largely apolitical compared to its US counterpart.

The institutional differences in appointment length, nomination process, and power of judicial review have created a more partisan and polarized Supreme Court in the United States. Moreover, as the US Congress became more polarized and dysfunctional, there was new pressure on the Court to solve political conflicts that the legislature could not, further politicizing the Court. Shifting partisan control of the US Supreme Court clearly has influenced decisions related to abortion. In the 2022 Dobbs decision to overturn *Roe v. Wade*, the six justices appointed by Republican presidents all voted to uphold the Mississippi law that limited access to abortion. The three justices appointed by Democratic presidents opposed the law.

The Mexican Supreme Court has been less polarized along party lines. All three of the blockbuster abortion decisions in Mexico in 2021 were unanimous, and half of the justices who voted to expand abortion access were appointed by presidents from the conservative Catholic PAN. In the 2008 decision to uphold Mexico City's decriminalization of abortion, all three votes against the law came from justices appointed by President Ernesto Zedillo of the centrist, secular PRI; whereas all of the justices appointed by President Vicente Fox of the conservative Catholic PAN, voted to uphold the law. In Mexico, there does not appear to be a relationship between the ideology of the appointing president and the abortion-related votes of the justices (Beer 2024).

CIVIL-SOCIETY AND CONSTITUTIONAL CONTEXT

In addition to less partisan polarization in the Mexican Supreme Court, there has been less civil-society influence in Court decisions. Given the short history of the Constitutional Court in Mexico, legal mobilization is still a new strategy for

in the United States. Whereas there is evidence in the United States that feminist legal activism has influenced Court decisions (McCammon et al. 2022), conservative legal activism has been even more effective (Dick 2021). The webpage of the conservative religious organization Alliance Defending Freedom boasts 15 US Supreme Court victories since 2011.

During one-party authoritarian rule in Mexico, autonomous organizations were severely constrained by the government and civil society was very weak. Civil-society organizations began to gain more influence during the transition to democracy in the 1990s. The Information Group on Reproductive Choice (GIRE) was founded in 1992. The judicial reforms of 1994 provided new opportunities for strategic litigation. Feminist groups such as GIRE have been at the forefront of developing legal strategies to promote greater access to abortion (Ayala García 2019). Furthermore, the feminist movement has been influential in the judiciary, especially among clerks and legal advisors. A network analysis of the feminist movement in Mexico by Zarembek and Rezende de Almeida (2022) found that the Mexican Supreme Court was the second most important node connecting feminist activists in Mexico in 2019. Their interviews confirm the importance of "the deep embedness of a small, elite, pro-choice network within the judiciary" (Zarembek and Rezende de Almeida 2022, 47).

The religious right in Mexico has not developed a sophisticated legal strategy. The *Red Familia* (Family Network) is the main face of the religious right in Mexico today. It has focused on protests, youth outreach, and media strategies but not litigation. The cases against Mexico City's abortion liberalizations in 2001 and 2008 were brought by the PAN, not civil-society organizations. The cases that opened access to abortion in the case of rape and risk to the health of the gestating person were both brought by GIRE.

In contrast to the United States, Mexico's Constitution provides an explicit right to gender equality and reproductive rights. Since 1974, Article 4 of the Mexican Constitution has stated: "Men and women are equal before the law" and "Everyone has the right to decide in a free, responsible, and informed manner about the number and spacing of their children." Since the transition to democracy, the Mexican Supreme Court has drawn on these constitutional guarantees in drafting opinions to legalize abortion. Although these constitutional guarantees predate the transition to democracy, without a Constitutional Court, the Constitution meant whatever the ruling party said it

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social movements. Insofar as civil-society groups have been influential on the courts, feminist groups have been more active and successful with judicial activism. This contrasts with the leading role played by conservative religious groups

meant. After the transition to democracy, however, activists used strategic litigation to breathe life into these constitutional rights. The Mexican Constitution also calls for gender parity in all government institutions (i.e., executive cabinets,

legislatures, and courts). The dramatic increase in women's representation in public office likely also has influenced political outcomes related to gender.

CONCLUDING THOUGHTS

The United States extended abortion rights much earlier than Mexico. However, during the past 20 years, Mexico has slowly increased legal access to abortions whereas the United States has increasingly criminalized the procedure. We can understand this divergence first by considering the effects of Mexico's late transition to democracy and the concomitant democratic decline in the United States. Institutional and political differences in the Supreme Courts have resulted in a more partisan Court in the United States. Second, the different civil-society and constitutional context in the two countries may have contributed to the different political trajectories. Mexico's feminist movement has been more active in legal mobilization for abortion rights than the religious right, whereas the opposite is true in the United States. Constitutional differences also may be a factor. The Mexican Constitution provides greater explicit protection for gender equality than the US Constitution, giving the Mexican Supreme Court stronger constitutional grounds for protecting reproductive health and autonomy.

CONFLICT OF INTEREST

The author declares that there are no ethical issues or conflicts of interest in this research. ■

NOTE

1. As this article went to press, the Mexican Congress approved a radical reform of Mexico's judicial institutions.

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